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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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As described in the Jurisdictional Statement, the three-judge district court had before it a plan—known as the Illustrative Plan—that demonstrated how a redistricting map could have been devised in this case that would have adequately remedied the constitutional violations in the previous congressional districting plan and that, unlike the plan the district court adopted, would also have complied with the one-person, one-vote requirement, with Section 2 of the Voting Rights Act, and with the principle of judicial restraint of *Upham* v. *Seamon*, 456 U.S. 37 (1982). The district court rejected the Illustrative Plan, on the ground that, in the court's view, it "split numerous counties * * *, apparently for racial reasons." J.S. App. 8a n.4. The Illustrative Plan, in fact, split only two counties outside the Atlanta area,

and there were non-racial reasons for each of the divisions. We show below that appellees' efforts to defend the district court's plan on other grounds are similarly insupportable. Because the court's error in rejecting the Illustrative Plan (or a plan similar to it) is so clear, and because Georgia's electorate will suffer substantial injury if elections this year are run under the court's plan, see J.S. 26, we continue to believe that this Court should summarily reverse the district court's decision and remand with instructions to adopt a plan, like the Illustrative Plan, containing two majority-minority districts and minimum population deviations.[1]

1. Our Jurisdictional Statement argues that "[t]he district court clearly erred in adopting a plan that deviates from the principle of population equality more than is necessary or justifiable." J.S. 10. As we point out, the Illustrative Plan that we submitted had a substantially lower overall population deviation than the court's plan (0.19% in the Illustrative Plan versus 0.35% in the court's plan) and comported more closely than did the court's plan with the State's policy choices (such as keeping Fort Benning intact

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[1] Appellees object to our request for summary reversal on the ground that we did not move in this Court for a stay of the district court's order adopting the plan. State Mot. to Aff. 19; Johnson Mot. to Aff. 2. We did not move for a stay because we did not believe that the plan this Court held to be unconstitutional in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), should be used for this year's elections, which would have been the effect of a stay of the district court's order. Now that the issues have been aired through the Jurisdictional Statement and the motions to affirm, there is sufficient time for this Court to take action that would permit a constitutional plan that complies with Section 2 of the Voting Rights Act to be implemented in time for this year's elections.

by splitting a county). Appellees do not dispute either point. Nor does either appellee attempt to defend the reason given by the district court for rejecting the Illustrative Plan—that it "split numerous counties outside of the metropolitan Atlanta area, apparently for racial reasons." J.S. App. 8a n.4. As we note in our Jurisdictional Statement (J.S. 12-15), the plan splits only two counties outside the Atlanta area and there are non-racial reasons—such as the need to lower the overall population deviation in the plan and to keep Fort Benning entirely in one district—for the split of the county in each case.

The state appellees argue that the larger population deviation in the court's plan (as compared to the Illustrative Plan) is justifiable because "there have been substantial population changes over the past six years throughout Georgia" and "[e]ven exact mathematical precision in a reapportionment plan based on the 1990 census necessarily must have significant current deviations *today*." State Mot. to Aff. 18. This Court rejected precisely that argument, however, in *Karcher* v. *Daggett*, 462 U.S. 725 (1983). Justice White's dissenting opinion in that case argued that the fact that "[d]istrict populations are constantly changing" could justify a legislature in adopting a plan with a larger-than-necessary overall deviation. *Id.* at 771. The Court rejected that argument on the ground that "problems with the data at hand apply equally to any population-based standard" and that "[a]s between two standards—equality or something less than equality—only the former reflects the aspirations of Art. I, § 2." *Id.* at 732. That principle applies even more clearly to this case, since court-ordered districting is held to a stricter standard than the legislative districting at issue in *Karcher*. See

Connor v. *Finch*, 431 U.S. 407, 413-414 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1975).

The Johnson appellees argue that the Illustrative Plan "has no probative value as a one person, one vote benchmark * * * because the DOJ did not respect Georgia's voting precincts in drawing its plan." Johnson Mot. to Aff. 24. As we note in our Jurisdictional Statement, however, it is doubtful that the Illustrative Plan splits many precincts. J.S. 16 n.10. The Illustrative Plan was drawn using census tracts, rather than voting precincts, as a guide. The size of a census tract is typically of the same order of magnitude as a precinct in Georgia, and a census tract is typically drawn based on considerations similar to those used in drawing precinct lines.[2]

The Illustrative Plan demonstrates that a remedy is feasible that has a lower overall population deviation than the court's plan and that otherwise comports with the law. Insofar as the Illustrative Plan

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[2] "Census tracts usually have between 2,500 and 8,000 persons and, when first delineated, are designed to be homogeneous with respect to population characteristics, economic status, and living conditions." U.S. Department of Commerce, Bureau of the Census, *1990 Census of Population: Social and Economic Characteristics, Georgia* A-5 (1993). A precinct in Georgia is supposed generally to include less than 2,000 electors (which means more than 2,000 people), Ga. Code Ann. § 21-2-263 (Michie Supp. 1995). Voting precincts are also supposed to follow the same kinds of landmarks that can be expected to form the boundaries of census tracts, such as "[v]isible features which are readily distinguishable upon the ground (such as streets, railroad tracks, streams, lakes, and ridges) and which are indicated upon official * * * maps, *current census maps*, city or county planning maps, * * * or any combination of such maps." Ga. Code Ann. § 21-2-261.1(a)(1) (Michie Supp. 1995) (emphasis added).

has to be adjusted to conform to Georgia's current precinct configuration, that could no doubt be accomplished without otherwise increasing the population deviation. Altering the lines in the Illustrative Plan in the few places where counties are divided—and where the Plan may therefore split some precincts—to follow precinct lines rather than census tract lines will have little overall effect on the Plan.

2. In our Jurisdictional Statement, we demonstrate that the court's plan violates Section 2 of the Voting Rights Act. Before this Court, neither the state appellees nor the Johnson appellees appear to contest that there is racially polarized voting in Georgia, see J.S. 15-17; that African-Americans' candidates of choice are usually defeated by white bloc voting, see J.S. 18-22; and that the totality of the circumstances demonstrates that minorities do not have an equal opportunity to participate in the electoral process and elect the candidates of their choice in east central Georgia, see J.S. 22-23. Those components of a Section 2 claim are based largely on the district court's own findings in the decision under review here and in its earlier decision in this case, and the evidence with respect to those points is clear and unambiguous.

Appellees appear to argue that African-Americans in east central Georgia are not sufficiently numerous and compact to form a majority in a congressional district in that area. See State Mot. to Aff. 12; Johnson Mot. to Aff. 11-12. Their arguments are unconvincing in the face of the configuration of the majority-minority Eleventh District in the Illustrative Plan, which demonstrates that African-Americans satisfy the numerosity/compactness re-

quirement. The Johnson appellees point out (Mot. to Aff. 12) that Linda Meggers, the Director of the State's redistricting office, testified that a second majority-minority district in Georgia was not possible. Her testimony on that subject, however, is squarely refuted by the configuration of the Eleventh District in the Illustrative Plan. Insofar as the district court relied on her testimony, rather than on the plan that was before it and that demonstrated that a compact majority-minority district was possible, the district court committed clear error.

Appellees suggest that the Eleventh District in the Illustrative Plan is deficient because it divides DeKalb County. Johnson Mot. to Aff. 18. The district court's own plan, however, also divides DeKalb County, although in a different way. See J.S. App. 15a-16a. Moreover, the district court found that the State's policy against splitting counties was not applicable in the Atlanta area, where DeKalb County is located and where numerous counties are split in both the Illustrative Plan and the court's plan. See *id.* at 8a, 15a-16a. The clean north-south divisions that the Illustrative Plan makes in DeKalb County are at least as regular as the divisions made in the other Atlanta-area counties in the court's plan, compare *id.* at 44a (Illustrative Plan) with *id.* at 41a (court's plan), and (unlike the court's plan) they closely resemble the divisions in DeKalb County that the State itself made in its first post-1990 plan, compare *id.* at 44a (Illustrative Plan) with *id.* at 46a (State's first post-1990 plan). As the district court stated, "the Georgia legislature has already made the political decision to split Dekalb for population density reasons, first in 1982, and again in each of the three plans presented to the DOJ for preclearance in

1992." *Id.* at 16a. The division of DeKalb County thus does not cast any doubt on the compactness of the Eleventh District in the Illustrative Plan or on its consistency with traditional state districting principles. Appellees offer no basis on which the district court's plan can be defended as in compliance with Section 2.[3]

3. The district court's plan also disregarded the principle, recognized by the district court itself, that "[i]n fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan." J.S. App. 2a (citing *Upham* v. *Seamon*, 456 U.S. 37 (1982)). As the Illustrative Plan demonstrates, the unconstitutional aspects of the State's plan can be corrected while hewing far more closely than does the district court's plan to the policies and plans the State itself has adopted in the past.[4] See J.S. 23-25. In particular, there are two important aspects of state redistricting

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[3] The Johnson appellees correctly point out (Mot. to Aff. 23 n.29) that they objected to the timing of the submission of the Illustrative Plan to the district court. The district court did not expressly rule on their objections. In its opinion in this case, the court rejected the Illustrative Plan entirely (although mistakenly) on its merits. J.S. App. 8a n.4.

[4] The Johnson appellees argue (Mot. to Aff. 17) that "Georgia accepts the court's Plan as fairly representing Georgia's traditional districting principles." Although the Governor and other Georgia officials have now taken that position in this case, the views expressed in litigation by those officials are not the best indication of the official redistricting policies of the State. Those policies are best expressed in the redistricting legislation that was enacted by the state legislature and signed by the Governor. Cf. *Garza* v. *County of Los Angeles*, 918 F.2d 763, 776 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

policy that are disserved by the court's plan and that are satisfied by the Illustrative Plan.

The Illustrative Plan is superior to the court's plan with respect to its fidelity to what the district court termed the State's "historic[]" (J.S. App. 18a) policy of drawing districts so as not to pit incumbents against each other. Appellees do not dispute that the Illustrative Plan is faithful to that policy. They do, however, appear to argue (Johnson Mot. to Aff. 8) that the court's plan also shows fidelity to that policy because "[t]o date, no incumbents are running against each other" in the court's districts. That argument actually illustrates the deficiencies of the court's plan. Appellees do not and cannot dispute that the court's plan contains two districts that place incumbents in districts with other incumbents and that the court's plan moves another incumbent into a new district. See J.S. App. 21a. If the result of the court's disregard of the State's policies is that no incumbents run against each other, it would demonstrate the probability that the court's plan either deterred incumbents from running for reelection or convinced them to run in new districts—precisely the results that a policy of protecting incumbents tries to avoid.

The Illustrative Plan also comports with the State's policy, evident in its first post-1990 plan, of creating two majority-minority districts, where that can be accomplished in a way consistent with other state goals and policies. The district court expressly recognized the existence of that policy. As we noted above, however, the district court erred in assessing whether that policy could be carried out, mistakenly rejecting the Illustrative Plan because it assertedly "split numerous counties outside of the metropolitan

Atlanta area, apparently for racial reasons," J.S. App. 8a n.4—a clearly erroneous finding that no appellee defends before this Court. But the district court did not reject the existence of the underlying state policy or the need to follow it. To the contrary, the court recognized that "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so." *Id.* at 21a n.16.

Appellees appear to argue that the district court's plan can be supported on a different and broader ground. They cite the principle that "a court's remedial powers extend beyond elimination of the actual mechanism of discrimination when a broader remedy is necessary to remedy racial injustice." Johnson Mot. to Aff. 21. By a "broader remedy" appellees presumably mean a districting plan in which no attention at all is paid to race, regardless of whether such a remedy violates Section 2 of the Voting Rights Act and the principle of judicial deference to legislative redistricting choices stated in *Upham* v. *Seamon*, *supra*.

There is no support for appellees' contention that a "broader remedy" in that sense was "necessary" here. The district court certainly did not believe that it was; the court expressed its desire to draw a plan with two compact majority-minority districts, but erred in assessing whether such a plan was possible. So long as the remedial plan does not "subordinate[] traditional race-neutral districting principles * * * to racial considerations," *Miller* v. *Johnson*, 115 S. Ct. 2475, 2488 (1995), the injury caused by the unconstitutional plan will be entirely redressed. Such a

remedial plan was possible here, and the court erred in failing to implement it. The district court's "equitable power to deal with unconstitutional racial discrimination," Johnson Mot. to Aff. 20, does not extend to permitting a court gratuitously to disregard the mandates of Section 2 of the Voting Rights Act and of *Upham* v. *Seamon*.

* * * * *

For the reasons given above, as well as those in our Jurisdictional Statement, this Court should summarily reverse the district court's order and remand to the district court with instructions to develop and put in place a new plan that is consistent with constitutional one-person, one-vote requirements and that contains two compact majority-minority districts. In the alternative, this Court should note probable jurisdiction and set the case for full briefing and argument.

Respectfully submitted.

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